



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Bonded Maintenance Co., Inc.

File: B-235207

Date: July 14, 1989

DIGEST

1. Protest challenging cancellation of an invitation for bids (IFB) after bid opening is sustained where no compelling reason justified cancellation because award under the IFB would meet the needs of the government without prejudice to other bidders.
2. A bidder's failure to sign its bid and three of four amendments may be waived as minor informalities where one amendment incorporating a Department of Labor wage determination was signed and the other amendments were either not material or the bidder's intent to be bound was evident.

DECISION

Bonded Maintenance Co., Inc., protests the cancellation of invitation for bids (IFB) No. WRO-89-B-1, issued by the Immigration and Naturalization Service (INS), Department of Justice, for janitorial services at the San Diego Border Patrol Sector buildings. Bonded contends that the cancellation was improper because the deficiencies in the solicitation did not constitute a compelling reason to cancel the solicitation. Bonded also maintains that, contrary to the contracting agency's determination, its bid was responsive.

We sustain the protest.

The IFB, issued November 18, 1988, was synopsisized in the Commerce Business Daily (CBD) as a small business set-aside and sent to 73 firms. INS issued four amendments to the IFB and received 16 bids by the January 24, 1989, bid opening. Bonded was the low bidder at \$162,774. Following review of the procurement prior to award, the agency determined that the following deficiencies in the IFB constituted a compelling reason to cancel the solicitation: the lack of a designated minimum bid acceptance period; the omission from the CBD synopsis of a specific note indicating that the procurement was a 100 percent small business set-aside and

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identifying the duration of the base and option periods; and the absence of three mandatory contract provisions. The agency also noted that it lacked a written advance procurement plan. Accordingly, INS canceled the IFB on March 31. The agency also concluded that Bonded's failure to sign its bid and acknowledge two of four amendments rendered its bid nonresponsive.

As explained below, none of the reasons offered to justify IFB cancellation is sufficient, under the circumstances here, to warrant cancellation after bid opening. We also find that Bonded's bid was responsive.

CANCELLATION OF THE IFB

Because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed, a contracting agency must have a compelling reason to cancel an IFB after bid opening. Federal Acquisition Regulation (FAR) § 14.404-1(a)(1).

INS first justifies cancellation of the IFB because of the contracting officer's failure to insert a specific number of calendar days in the standard minimum bid acceptance period clause, FAR § 52.214-16, included in the IFB. The IFB stated that this clause superseded the provision in Block 12 of Standard Form (SF) 33 which provides for a 60 calendar day acceptance period unless the bidder specifies otherwise. (The contracting officer had marked "N/A" in the blank in Block 12 for insertion of other than a 60 calendar day acceptance period.) The agency concluded that because of this omission, Bonded's bid may not have been valid and the bidders did not compete on a common basis.

We find that although a minimum bid acceptance period was not specified by the agency, and none of the bidders, including Bonded, included an acceptance period in their bids, bidders were not prejudiced by INS' error. Although bidders were free to insert an alternative acceptance period in the clause, none did; neither did any bidder withdraw its bid prior to the IFB cancellation. Accordingly, no bidder assumed a greater risk of price or market fluctuation than did Bonded or any other bidder. Moreover, no bidder questioned the omission of the minimum bid acceptance period, or protested the omission to INS or our Office before bid opening.

Once bids have been opened and prices exposed, the fact that a particular provision of an IFB is defective does not, per se, require cancellation of the IFB. We generally regard

cancellation as inappropriate when other bidders would not be prejudiced by an award under the ostensibly deficient solicitation and when such an award would serve the actual needs of the government. Dyneteria, Inc.; Tecom, Inc., B-210684; B-210684.2, Dec. 21, 1983, 84-1 CPD ¶ 10. Accordingly, we find that the omission of a minimum bid acceptance period from the IFB here was not a compelling reason justifying cancellation of the IFB since award under the solicitation would meet the needs of INS without prejudice to any bidder.

The agency's second reason for cancellation concerns the synopsis of the procurement published in the CBD. The synopsis stated that the proposed acquisition of cleaning services was a "small business set-aside," but did not state that it was a "100 percent" small business set-aside, did not include the standard notation applicable to such set-asides, and did not indicate the duration of the base or option periods as required by FAR § 5.207(c) and (d).

A defective CBD notice can render a procurement defective. See, e.g., Frank Thatcher Assocs., Inc., 67 Comp. Gen. 77 (1987), 87-2 CPD ¶ 480. However, we see no reason why the synopsis here warrants cancellation. The purpose of the CBD notice is to publicize proposed procurements to potential offerors. In response to the synopsis that was published, INS received 26 requests for the IFB and, after sending the IFB to 73 firms, received bids from 16 small businesses. Further, no one has complained about being misled by the notice. Thus, there is simply no evidence of prejudice to any one here because of the defects in the CBD notice. Accordingly, we find that the defective CBD notice did not constitute a compelling reason sufficient to justify cancellation of the solicitation.

INS' last reason for cancellation is the omission of the following mandatory contract clauses from the IFB: the provisions for a drug-free workplace; the provision regarding taxes on contracts performed in United States possessions or Puerto Rico; and the prompt payment provision. In addition, INS states that the contract file did not contain a written acquisition plan.

The Drug-Free Workplace certification and compliance clauses, FAR § 52.223-5, -6, that implement the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, § 5152(a)(1), 102 Stat. 4304 (1988), require each contractor to certify compliance with the statute's requirements regarding a drug-free work environment. FAR § 23.500. That certification is a responsibility requirement, in accordance with the Act's provision that a contractor shall not be considered a

"responsible source" unless it certifies that it will provide a drug-free workplace, and the implementing regulations, which provide that if the solicitation does not contain the certification, the contracting officer shall obtain the certification prior to award. FAR § 23.505(d); Universal Hydraulics, Inc., B-235006, June 21, 1989, 89-1 CPD ¶ _____. Since the Act and the implementing regulations, by their own terms, permit a contracting officer to accept a contractor's certification up until the time of award, omission of the clauses from the IFB provides no basis for canceling the solicitation.

With respect to the omission of the provision regarding taxes on contracts performed in the United States possessions or Puerto Rico, it is clear that this clause had no relevance to a contract to be performed in the mainland United States and therefore no bidder was prejudiced by its omission.

The Prompt Payment clause, FAR § 52.232-25, was required to be included in the IFB pursuant to FAR § 32.908(c). The clause essentially provides that the government must pay interest penalties on overdue contract payments, and that the required payment due date is that specified in the contract, or, if none is specified, the 30th day after receipt of a proper invoice. The clause thus is principally for benefit of the contractor. Here, none of the bidders objected to the omission of the clause. Moreover, since the protester's bid was silent as to payment terms, the protester did not attempt to gain any competitive advantage over the other bidders in this area. Since there is no evidence that bidders were prejudiced by omission of the clause, or that the actual needs of INS will not be served by award to Bonded, we do not believe that this omission rendered the IFB so defective as to require cancellation. See Ashland Chemical Co., B-216954, May 16, 1985, 85-1 CPD ¶ 555.

Finally, it is clear that INS' failure to include an advance procurement plan in the contract file had no bearing on the preparation or evaluation of bids, and thus was not prejudicial to the bidders in any way. Accordingly, the lack of an advance procurement plan provides no basis for canceling the IFB.

In short, we find none of the reasons proffered by the agency for canceling the IFB, either individually or taken together, sufficient to warrant cancellation in this case.

RESPONSIVENESS OF BONDED'S BID

As explained further below, we also find that Bonded's bid was responsive despite the company's failure to sign the bid or return with its bid two of the amendments to the IFB.

A bid that is not signed generally must be rejected as nonresponsive because, without an appropriate signature, a bidder would not be obligated upon the government's acceptance of the bid. Inge Ellefson, B-212785, Sept. 2, 1983, 83-2 CPD ¶ 303. There is, however, an exception to this general rule that allows for waiver of the failure to sign the bid as a minor informality when the bid is accompanied by other documentation signed by the bidder (such as a properly executed bid bond or an amendment bearing the bidder's signature) which clearly evinces the bidder's intent to be bound by the bid submitted. FAR § 14.405(c)(1); Wilton Corp., 64 Comp. Gen. 233 (1985), 85-1 CPD ¶ 128.

Here, Bonded signed and returned with its bid amendment No. 2, which incorporated the Department of Labor wage determination. Accordingly, Bonded's failure to sign its bid was a minor informality since Bonded's signature on the amendment clearly evinced Bonded's intent to be obligated upon the government's acceptance of the bid. Wilton Corp., 64 Comp. Gen. 233, supra.

With respect to Bonded's failure to return the remaining amendments, INS indicated on SF 30, the solicitation amendment form used for all four amendments, that the bidders were not required to return the amendments. INS also did not fill in the blank indicating how many copies of the amendments were to be returned to the issuing office. Accordingly, Bonded did not acknowledge amendment No. 1, which added bi-weekly and monthly exterior services but did not include a pricing table for those tasks; amendment No. 3, which extended the bid opening date to January 24, 1989, and added Schedule B, a pricing table which included the new tasks added by previous amendment; or amendment No. 4, which reduced the estimated square footage of one of eleven areas to be cleaned to correctly reflect the dimensions shown in the specification drawings included in the solicitation.

A bidder's failure to acknowledge a material IFB amendment renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Maintenance Pace Setters, Inc., B-213595, Apr. 23, 1984, 84-1 CPD ¶ 457. An amendment is material, however, only if it would have more

than a trivial impact on price, quantity, quality, delivery, or the relative standing of the bidders. FAR § 14.405; Wirco, Inc., 65 Comp. Gen. 255 (1986), 86-1 CPD ¶ 103. An amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation, such as where the amendment merely clarifies an existing requirement. Site Development, Inc., B-232813, Dec. 22, 1988, 88-2 CPD ¶ 620. In that case, the failure to acknowledge the amendment may be waived as a minor informality and the bid may be accepted. Emmett R. Moody, 63 Comp. Gen. 182 (1984), 84-1 CPD ¶ 123.

Moreover, constructive acknowledgment of an amendment is an exception to the general rule that a bidder's failure to acknowledge a material amendment requires the agency to reject the bid as nonresponsive. It applies when the bid itself includes one of the essential items appearing only in the amendment, such as a price for an item that was added by amendment. See N.B. Kenney Co., Inc., 65 Comp. Gen. 265 (1986), 86-1 CPD ¶ 124. This principle is consistent with the regulatory provision that permits a bidder's failure to return an amendment to be waived as a minor informality if the bid clearly indicates that the bidder received the amendment. FAR § 14.405(d)(1).

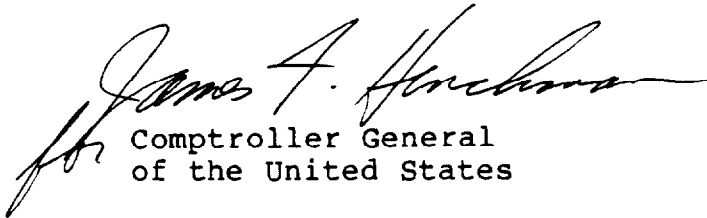
INS concluded that amendment Nos. 3 and 4 were material and that Bonded's failure to acknowledge them required INS to reject Bonded's bid. We do not agree. Amendment No. 3 was issued to provide a new pricing schedule that included certain services added by amendment No. 1 and to extend the bid opening date. Although Bonded failed to return the amendment with its bid, it did include the new pricing schedule in its bid, thereby constructively acknowledging receipt of the amendment and indicating its intent to be bound. Nuclear Research Corp., Ridgeway Electronics, Inc., B-200793; B-200793.2, June 2, 1981, 81-1 CPD ¶ 437.

Amendment No. 4 corrected an inconsistency in the estimated square footage requirements for one of eleven areas covered in the solicitation, reducing the estimate from 6,100 to 1,741 square feet, a ten percent reduction in total estimated interior area to be cleaned. However, the solicitation also included drawings that provided specific dimensions for each room in each of the eleven areas, to be utilized by offerors in determining square footage for each area. Accordingly, the amendment did not change the requirements of the original solicitation, which provided bidders with specific drawings upon which to base their bids; rather, it merely corrected an error in the agency's estimate of the square footage of that area in the narrative section of the statement of work. Since the amendment

merely clarified an existing requirement and did not impose a different legal obligation on the bidder, we conclude that the amendment was not material and that Bonded's failure to return it with its bid may be waived as a minor informality. Site Development, Inc., B-232813, supra; Emmett R. Moody, 63 Comp. Gen. 182, supra.

In view of our findings that INS did not have a compelling reason to cancel the IFB and that Bonded's bid was responsive, we recommend that the IFB be reinstated and award made to Bonded, the low responsive bidder, provided that Bonded is found to be a responsible firm. We also find that Bonded is entitled to the costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1988).

The protest is sustained.


for Comptroller General
of the United States